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No. 95-

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1995

H. JAY SPIEGEL, Petitioner,

v.

BRUCE BABBITT, ET AL., Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does a citizen have standing to sue to enforce the terms of a Deed of Easements between the National Park Service and a private land owner establishing a unit of the National Park Service on private property where it is alleged that the violation of the terms of the Deed of Easements by the National Park Service has directly injured the citizen?

2. Does the picking up and discharge of fee-paying passengers at a dock located on land controlled by the National Park Service within a unit of the National Park System constitute a "commercial activity" within the park?

3. 36 C.F.R. §1.5(c) requires a Superintendent of a National Park, prior to implementing a public use limit, to prepare a written determination justifying the action, which must set forth the reason(s) the public use limit has been established, and an explanation of why less restrictive measures will not suffice. Where a public use limit is enacted, restricting overnight mooring of vessels at a dock located within a unit of the National Park System, without an explanation of why less restrictive measures will not suffice, is such action on the part of the National Park Service arbitrary and capricious and, thus, voidable by a Federal Court under 5 U.S.C. §706?

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

H. Jay Spiegel, Petitioner,

v.

Bruce Babbitt, et al., Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

H. Jay Spiegel respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals is reproduced in Appendix A: App. pp. 1a - 2a. The Memorandum Opinion and Order of the district court entered on May 27, 1994 is reproduced in Appendix B: App. pp. 3a - 11a. The Memorandum Opinion and Order on Motion To Vacate entered on July 1, 1994 is reproduced in Appendix C: App. pp. 12a - 15a. The district court opinions are jointly reported as *Spiegel v. Babbit*, 855 F. Supp. 402 (D.D.C. 1994).

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia was entered on May 31, 1995. Appendix A; App. pp. 1a - 3a. The order of the United States Court of Appeals for the District of Columbia denying a rehearing and rehearing *en banc* was entered July 28, 1995. Appendix D; App. pp. 16a-17a; Appendix E; App. pp. 18a-19a. The jurisdiction of this Court is based on Rule 10.1(a) of the Rules of the Supreme Court and 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

5 U.S.C. § 702: Right of review

> A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof. An action in a court of the United States seeking relief other than money damages and stating a claim that an agency or an officer or employee thereof acted or failed to act in an official capacity or under color of legal authority shall not be dismissed nor relief therein be denied on the ground that it is against the United States or that the United States is an indispensable party. The United States may be named as a defendant in any such action, and a judgment or decree may be entered against the United States: Provided, That any mandatory or injunctive decree shall specify the Federal officer or officers (by name or by title), and their successors in office, personally responsible for compliance. Nothing herein (1) affects

other limitations on judicial review or the power or duty of the court to dismiss any action or deny relief on any other appropriate legal or equitable ground; or (2) confers authority to grant relief if any other statute that grants consent to suit expressly or impliedly forbids the relief which is sought.
(Sept. 6, 1966. P. L. 89-554, § 1, 80 Stat. 392; Oct. 21, 1976, P. L 94-574, § 1, 90 Stat. 2721.)

5 U.S.C. § 703: Form and venue of proceeding

The form of proceeding for judicial review is the special statutory review proceeding relevant to the subject matter in a court specified by statute or, in the absence or inadequacy thereof, any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction. If no special statutory review proceeding is applicable, the action for judicial review may be brought against the United States, the agency by its official title, or the appropriate officer. Except to the extent that prior, adequate, and exclusive opportunity for judicial review is provided by law, agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.
(Sept. 6, 1966. P. L. 89-554, § 1, 80 Stat. 392; Oct. 21, 1976, P. L 94-574, § 1. 90 Stat. 2721.)

5 U.S.C. § 704: Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate

remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency or authority.
(Sept. 6, 1966. P. L. 89-554, § 1, 80 Stat. 392.)

5 U.S.C. § 706: Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall--
(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be--
(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.
(Sept. 6, 1966, P. L 89-554, § 1, 80 Stat 393.)

36 C.F.R. §1.5(c):

Except in emergency situations, prior implementing or terminating a restriction, condition, public use limit or closure, the superintendent shall prepare a written determination justifying the action. That determination shall set forth the reason(s) the restriction, condition, public use limit or closure authorized by paragraph (a) has been established, and an explanation of why less restrictive measures will not suffice, or in the case of a termination of a restriction, condition, public use limit or closure previously established under paragraph (a), a determination as to why the restriction is no longer necessary and a finding that the termination will not adversely impact park resources. This determination shall be available to the public upon request.

STATEMENT OF THE CASE

On January 7, 1985, the National Park Service entered into a Deed of Easements with private landowners of property commonly known as Washington Harbour, a tract of land in the District of Columbia bounded by 30th and 31st Streets, N.W., K Street, N.W., and the Potomac River, which granted the National Park Service certain less-than fee rights in the property which became incorporated within the unit of the National Park Service known as the Georgetown Waterfront Park. Appendix J; App. pp. 37a-49a. The property at issue is the site of a dock adjacent to the Potomac River in close proximity to a number of restaurants and other facilities. The dock, which is the only public dock in or near Georgetown, is a popular destination for boaters, and the privately owned facilities at Washington Harbour are popular with tourists and residents alike because of the view afforded of the Potomac, nearby bridges, and Theodore Roosevelt Island Park.

Petitioner is a boat owner who has used the park at Washington Harbour since 1987. Appendix H; App. p. 27a. Prior to 1991, he was able to tie up his vessel at all portions of the Washington Harbour dock and did so at various times day and night, mooring overnight on numerous occasions. Appendix H; App. p. 28a. In 1991, the National Park Service issued an order restricting overnight mooring to "2 hours between Midnight and 6:00 AM". Appendix H; App. pp. 28a, 29a. Signs were posted stating this restriction. Appendix H; App. pp. 28a, 29a. On a number of occasions, Petitioner and his vessel were ejected from the Washington

Harbour dock between the hours of midnight and 6:00 AM for overnight mooring. Appendix H; App. p. 29a. In 1992, the National Park Service designated one-fifth of the dock as an exclusive commercial use licensee zone for the exclusive use of tour boats and posted signs to that effect. Appendix H; App. p. 29a. The National Park Service sold permits to tour boat owners, permitting their boats to dock at the commercial use licensee zone for the purpose of picking up and discharging fare-paying passengers. Appendix H; App. p. 29a. Petitioner and his vessel were also ejected, on more than one occasion, while mooring in the exclusive commercial use licensee zone. Appendix H; App. p. 29a. The Deed of Easements contains a provision which specifically forbids the National Park Service from conducting or permitting commercial activities in those areas within their jurisdiction at Washington Harbour. Appendix J; App. p. 49a.

Petitioner sued the Secretary of the Department of the Interior as well as the Department of the Interior, the National Park Service and other relevant agencies and officials in their official capacities on April 1, 1994, in the United States District Court for the District of Columbia. The basis for federal jurisdiction was 28 U.S.C. §1331. Petitioner alleged that the establishment of a commercial use licensee zone at the Washington Harbour dock in Georgetown Waterfront Park, a unit of the National Park Service located in Washington, D.C., and the subsequent selling of permits to owners of commercial vessels allowing them to moor their commercial vessels at the Washington Harbour dock to pick up and discharge passengers violated the Deed of Easements between the National Park Service and the private property owner which created the dock. The Deed of Easements states: "The

parties recognize that the National Park Service will administer all areas required herein to be kept open to the public at all times as areas of the National Park System, provided that the National Park Service shall not conduct nor permit commercial activities in such areas." Appendix J; App. p. 49a. Petitioner requested that the Court compel respondents to eliminate the commercial use licensee zone and cancel the permits sold to owners of commercial vessels to moor there.

Petitioner further alleged that the National Park Service had violated 36 C.F.R. §1.5(c) by enacting an overnight mooring restriction at the Washington Harbour dock without preparing a proper justification under 36 C.F.R. §1.5(c). Relying upon 5 U.S.C. §706, petitioner requested that the Court direct Respondents to rescind the overnight mooring restriction as arbitrary and capricious.

The district court denied Petitioner's Motion for a Preliminary Injunction and granted a Motion for Summary Judgment filed by the National Park Service. Appendix B; pp. 3a - 11a. The district court ruled that the commercial use licensee zone and permits granted to owners of commercial vessels did not violate the Deed of Easements. The district court further ruled that the actions of respondents in enacting the overnight mooring restriction were not violative of 36 C.F.R. §1.5.

The district court determined that the establishment of the commercial use licensee zone did not violate the terms of the Deed of Easements, expressly finding that "allowing passengers to embark and disembark from boats is not a

commercial activity." Appendix B; App. p. 8a; 855 F. Supp. at 404. The court further ruled that "pursuant to its authority to regulate and control activities in the easement area ..., the park service has the authority to set aside a certain portion of the dock for the exclusive use of the commercial passenger boats, benefiting the public at large." Appendix B; App. p. 8a; *Id.* at 404. Petitioner moved to vacate, citing *United States v. Carter*, 339 F. Supp. 1394 (D. Ariz. 1972), for the proposition that docking a vessel within a unit of the National Park System constitutes engaging in business within the System. The district court denied the motion. Appendix C; App. pp. 12a-15a. It ruled that at Washington Harbour "the tour boats at issue pull up to the water entrance of Washington Harbour; they do not enter or cross the national park area." Appendix C; App. p. 13a. Accordingly, the court ruled that "the embarkment and disembarkment of paying passengers at park entrances do not constitute commercial activity within a park." Appendix C; App. p. 14a.; *Spiegel*, 855 F. Supp. at 405.

The district court also sustained the overnight mooring restriction. It found that the "written determination satisfies the requirement of 36 C.F.R. 1.5(c)." Appendix B; App. p. 6a; *Id.*, at 403. The district court did not directly address Petitioner's contention that the written analysis failed to consider less restrictive alternatives.[1]

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[1] Petitioner pressed his arguments concerning the lack of analysis of less restrictive alternatives in his Motion to Vacate. The Court did not comment on this argument in denying the motion.

Petitioner timely appealed the decision of the district court to the United States Court of Appeals for the District of Columbia Circuit. In its brief order, the Court of Appeals ruled, without explanation, that petitioner "lacks standing to bring his claim concerning the commercial zone." Appendix A; App. pp. 1a-2a. Accordingly, the Court of Appeals vacated the decision of the district court concerning the violation of the Deed of Easements and remanded the case to the district court with instructions to dismiss this count. The Court of Appeals sustained the rulings of the district court with respect to the overnight mooring issue, ruling that "the district court properly determined that the written determination prepared to justify the overnight docking restriction at Washington Harbour satisfies the requirement of 36 C.F.R. §1.15(c) [sic] and that rulemaking procedures were not required." A petition for rehearing and suggestion for hearing in en banc was summarily denied. Appendix D; App. pp. 16a-17a; Appendix E; App. pp. 18a-19a. This petition followed.

REASONS FOR GRANTING THE WRIT

I. The Standing Of Citizens to Enforce Provisions In Parkland Deeds of Easement is an Important Question of First Impression.

Easements, once a relatively exotic interest in property, have become an increasingly important tool of land management within the National Park System. In March,

1979, the National Park Service issued a LAND ACQUISITION POLICY IMPLEMENTATION GUIDELINE NPS-25 setting forth an individual park area acquisition plan including the use of "Scenic easements or other less-than-fee interests" negotiated with private landowners to create park areas. Appendix F; App. pp. 20a-21a. As of August 30, 1995, the National Park Service had acquired easement interests in approximately 3,200 tracts of land. See Appendix L (letter from William D. Shaddox to David C. Masselli dated August 30, 1995); App. pp. 53a-54a. As of December 31, 1994, the National Park Service had acquired less-than-fee interests in non-federal private land exceeding 4 million acres as well as easement interests in over 222,000 acres of federal land. See Appendix M (See Master Deed listing attached to Shaddox's letter); App. pp. 55a-57a.

One of these less-than-fee interests is Washington Harbour, a privately owned tract of land in the District of Columbia bounded by 30th and 31st Streets, N.W., K Street, N.W., and the Potomac River, within the unit of the National Park Service known as the Georgetown Waterfront Park. On this tract of land, pursuant to a Deed of Easements executed on January 7, 1985, between the United States and the private property owners, a public park comprising a unit of the National Park Service was created. Appendix J; App. pp. 37a-49a. Pursuant to the Deed of Easements, paragraph 18, the National Park Service only has jurisdiction over those areas of Washington Harbour that are "required ... to be kept open to the public at all times ...". Appendix J; App. p. 49a. These areas include the Washington Harbour dock and the adjacent easement including a boardwalk and an adjacent

brick walkway. Appendix J; App. pp. 40a-42a, 44a. As also pointed out in paragraph 18 of the Deed of Easements, in those areas under the jurisdiction of the National Park Service, the National Park Service is admonished that they "shall not conduct nor permit commercial activities in such areas". Appendix J; App. p. 49a.

The entire Washington Harbour Unit of the Georgetown Waterfront Park is situated on private land subject to an easement. Respondents conceded during argument before the district court, that "many thousands of people" use the park in question. App. G, App. p. 24a._____ The park at Washington Harbour is just one of thousands of tracts of land encompassing millions of acres which are administered by the National Park Service through ownership of less-than-fee interests. Appendix L; App. pp. 53a-54a; Appendix M; App. pp. 55a-57a.

Petitioner is unaware of any prior decision concerning the standing of a member of the public to complain about the government's violation of a Deed of Easements executed to create a National Park, where the government's violation of the agreement has damaged the member of the public. Assuming *arguendo* that the damages suffered by Petitioner as enumerated above come up to the constitutional minimum for standing, the only conceivable basis for the ruling by the Court of Appeals that the Petitioner lacks standing to sue to enforce the Deed must be that because the Petitioner is not a party to the Deed of Easements he cannot complain when one party violates its terms and conditions.

II. Parkland Deeds of Easement Are Used To Effect Public Purposes

It is without dispute that citizens would have standing to challenge activities of the National Park Service on park land held in fee if the actions violated laws or regulations governing those units. Deeds of Easement are the functional equivalent of such laws; they establish the ground rules governing the conduct of the National Park Service. This case provides an opportunity for the Court to protect the rights of citizens who are third party beneficiaries to these agreements entered into by the National Park Service with private landowners creating or expanding units of the National Park system.

The history of the Washington Harbour project shows how Deeds of Easements are used to effect public purposes. The background to the development of Washington Harbour is set out, in some detail, in *Committee of 100 on the Federal City et al. v. Hodel*, 611 F. Supp. 547 (D.D.C. 1985), *rev'd. on other grounds*, 777 F.2d 711 (D.C. Cir. 1985). As noted by the District Court *Id.* at 551-552, the following steps were part of the process undertaken in the negotiation and execution of the Deed of Easements: two environmental assessments were prepared, two public hearings were conducted by NPS, additional public hearings were held before the D.C. Historic Preservation Board, the Old Georgetown Board of Consultants to the Commission of Fine Arts, the C&O Canal Advisory Commission, and the National Capital Planning Commission. The resulting agreement did

far more than create a small dock on the Potomac River; it defined, in many ways, a major development project. The Deed expressly created rights "for the benefit of the United States," including the creation of a public park.

There can be no doubt that all of these agencies, commissions, boards and the citizens who testified before them believed that the public process in which they were engaged would be amenable to public enforcement if the rules established in the Deed of Easements were broken. Not least among these are the Respondents. After the District Court decision in this case, the owners of the Washington Harbour complex requested amendments in the Deed of Easements because Respondents were enforcing the prohibition on commercial uses against restaurants that had placed tables in the easement area. Respondent Stanton, director of the National Capital Park Region of the NPS sent a letter to the general manager of the Washington Harbour complex on July 15, 1994, stating, *inter alia*, that he had discussed with his legal staff:

> "The possibility of a modest amendment of the Deed of Easement [sic] that would allow activities that are currently prohibited. Such an amendment, however, would require the National Park Service to submit any proposed changes to a public review process, including scheduling public meetings in connection with preparation of an environmental assessment. Further, it must take into account not only public support for proposed changes but also those who would oppose such amendments."

Appendix I; App. pp 33a-34a.

Respondent Stanton's letter of July 15, 1994 makes clear his belief that an amendment to the Deed of Easements could not be legal unless an extensive review process is undertaken. If this were a truly private contract in which only the immediate parties had rights, no such elaborate actions would be needed. The parties to the original Deed could simply modify their contract. That they do not do so is an indication that, at least, the Park Service believes the process which established the park unit and led to approval of the Deed of Easements is subject to review.

If amending the Deed of Easements requires compliance with these public participation steps, can improperly altering it escape enforcement altogether? If there is no standing to enforce its terms, why doesn't Director Stanton simply tell Mr. Williams that the parties will begin operating under the proposed arrangement because no one else can complain about it anyhow? In the present case, the Deed of Easements clearly forbids Respondents from conducting or permitting commercial activities in the easements? Doesn't the act of designating a commercial use licensee zone, selling permits to owners of commercial tour boats and allowing those tour boats to pick up and discharge fare paying passengers amount to a *de facto* amendment of the Deed of Easements triggering the very public review process the Park Service so adamantly requires of the owners of the Washington Harbour complex before they can move restaurant tables?

Before a stranger can avail himself of the privilege of suing for a breach of an agreement, to which he is not a

party, he must, at least, show that it was intended for his direct benefit. *Robins Dry Dock & Repair Co. v. Flint*, 275 US 303, 307, 48 S. Ct. 134, 135 (1927). 16 U.S.C. §1a-1 describes as one main purpose of the National Park System "...one national park system preserved and managed for the benefit and inspiration of all the people of the United States...". Washington Harbour was established as a unit of the National Park System only after an extensive public review of the terms and conditions of the Deed of Easements. Under the facts and circumstances of this case, an injured citizen must have standing to sue to compel obedience to the terms and conditions of the Deed or the entire process leading up to its adoption can only be seen as a sham.

III. There Was No Basis for The Decision of the Court of Appeals, Rendered Without Detailed Explanation, That Petitioner Lacks Standing to Enforce the Deed

The Court of Appeals ruled that Petitioner did not have standing to sue to enforce the provisions of the Deed of Easements insofar as they impinged on the authority of the Park Service to establish a commercial use licensee zone and remanded that portion of the case to the District Court with direction to dismiss it. Because the Court of Appeals did not provide any basis for its decision, Petitioner is left, unfortunately, with the task of determining what rationale, if any, underlay the finding that he had no standing. Quite simply, there is no justification.

Prior holdings of this Court have established an "irreducible constitutional minimum" for standing consisting of (1) an injury in fact which is (a) particularized and concrete and (b) actual or imminent, (2) a causal relationship between the injury and the challenged action and (3) a likelihood that the injury will be redressed by a favorable decision. *Lujan v. Defenders of Wildlife*, 504 US 555, 112 S. Ct. 2131, 2136 (1992). Petitioner was not only deprived of "recreational opportunity," he faced ejection and, presumably, arrest for docking in an area that should have been open to the public, but for the imposition of the commercial zone by Respondents. There is no reasonable question of causation, nor any doubt that the injury to Petitioner would be completely redressed by an order vacating Respondent's creation of the commercial use licensee zone. It is difficult to conceive of a stronger argument for standing.

Much of the recent litigation concerning standing has involved claims by "organizational plaintiffs." To the extent that this Court has placed some limitations on standing, it is generally the case that these limitations have been a function of the inability of the organizational plaintiffs to demonstrate particular injury. This does not in any way detract from the historical rule that a party who has suffered a direct injury almost always has standing. The Court recently reaffirmed this position:

> When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred (at the judgement stage) or proved (at the trial stage) in order to establish standing depends considerably upon whether the plaintiff is

> himself an object of the action (or foregone action) at issue. If he is, there is ordinarily little question that the action or inaction has caused him injury, and that the judgment preventing or requiring the action will redress it.

Lujan v. Defenders of Wildlife, 112 S. Ct. 2131, 2137 (1992).

A. Petitioner Has Suffered A Concrete Injury From The Enforcement of the Commercial Zone.

The record below contains the following uncontested statement of the injury suffered by the Petitioner.

> On numerous occasions, including, specifically, on May 30, 1993, the undersigned has been ordered, by persons claiming color of authority, to unmoor the undersigned's vessel from that area of the Washington Harbour dock which has been restricted by the National Park Service for exclusive use by commercial licensees. On each such occasion, the undersigned has unmoored his vessel, under protest, and after specifically informing the persons claiming color of authority that the commercial use zone is not legal under the Deed of Easements."

Affidavit of H. Jay Spiegel dated March 30, 1993, ¶10. Appendix H; App. p. 29a.

The Affidavit describes a concrete injury to a legally-protected right: Petitioner's right to moor his vessel at a location on a public dock. The injury, ejection from the dock, is directly traceable to the imposition of the commercial use

licensee zone. The injury is certainly concrete, nor is it a mere hypothetical.

B.The Injury to Petitioner is of a Recreational Nature.

Not every injury provides a basis for standing. There is a constitutional minimum that the injury should be at least an "identifiable trifle." *U.S. v. SCRAP*, 412 US 669, 689, 93 S. Ct. 2405, 2417 (1973). Deprivation of recreational opportunity is a recognizable injury which gives rise to standing. *Sierra Club v. Morton*, 405 US 727, 734, 92 S. Ct. 1361, 1368 (1972). Petitioner has submitted affidavits conclusively establishing not only an injury to a cognizable interest, but that he was specifically "among the injured." *Id.* at 735, 92 S. Ct. at 1366.

C.The Establishment of the Commercial Use Licensee Zone Was Final Agency Action.

Petitioner petitioned to have Respondents eliminate the commercial use licensee zone at Washington Harbour, cancel the permits sold to commercial tour boat operators and take down the signs imposing docking restrictions. Respondents refused to do so. Petitioner has characterized this refusal, by letter from Respondent Stanton to Petitioner, as final agency action. This is not disputed in the record.

Such final agency action, on a matter not committed solely to agency discretion, is subject to judicial review by a party who otherwise meets the Constitutional requirements for standing. 5 U.S.C. §704; *Lujan v. National Wildlife*

Federation, 497 U.S. 871, 882, 110 S. Ct. 3177, 3185 (1990).

D. There is a Clear Causal Connection Between the Injury to Petitioner and The Challenged Action.

A plaintiff complaining of injury must be able to demonstrate that "there must be a causal connection between the injury and the conduct complained of -- the injury has to be "fairly .. trace[able] to the challenged action of the defendant and not ... th[e] result [of] the independent action of some third party not before the court." *Lujan v. Defenders of Wildlife*, 112 S. Ct. at 2136, quoting *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 41-42, 96 S. Ct. 1917, 1926 (1976).

No reasonable question of causal connection can be raised here. Respondent created the commercial licensee zone; Respondent enforced the zone; agents of Respondent ejected Petitioner from the dock.

E. The Injury to Petitioner Can Be Fully Redressed By A Favorable Decision

The injunction sought be Petitioner would fully redress his injury. If Respondent were required to adhere to the language of the Deed of Easements, it would dismantle the administrative edifice of the commercial use licensee zone and return that portion of the dock to public use.

IV. Respondents Have Previously Taken A Very Different Position On What Constitutes Commercial Activities Within A National Park

The issue of what constitutes commercial activity within a national park is not a new one.Traditionally, the National Park Service has taken the position that private tour boat owners who dock in a National Park are engaging in commercial activity within the park. The Park Service generally does this to protect its right to designate concessionaires who have the right to operate in such parks.

An early case involved a tour boat which docked at Fort Sumter. *United States v. Gray Line Water Tours of Charleston*, 311 F.2d 779 (4th Cir. 1962) By regulation, the Park Service prohibited any person from "engaging in or soliciting any business .. within any park or monument" without Park Service approval. 16 C.F.R. §1.31 (a)(2). The Park Service argued that docking at the Fort Sumter pier constituted doing business within the park. The Court of Appeals agreed, ruling that "when a vessel comes alongside the pier debarking or taking on passengers we think this is, practically, an activity on or within the pier itself, and thus on or within Fort Sumter". *Id.* 311 F. 2d at 780. The same court went on to explain that "We think, too, that the use of the pier by Gray Line was clearly an engaging-in-business and for the reason noted was on government property".

The same issue arose some years later when the Park Service sought to stop a tour boat operator from picking up

and discharging passengers in Glen Canyon National Recreation Area. *United States v. Carter*, 339 F. Supp. 1394 (D. Ariz. 1972). Again the Park Service sought to protect its currect concessionaires by prohibiting such docking. It argued that the defendant was "doing business" within the park. The district court agreed and enjoined the defendant from further docking.

V. The Overnight Mooring Restrictions Were Issued Without Adequate Justification and in Violation of Park Service Procedures and Policies.

It is axiomatic that every government agency must follow its rules and guidelines when taking administrative action. *Service v. Dulles*, 354 US 363, 388, 77 S. Ct. 1152, 1165 (1957)

A. The Park Service Did Not Provide An Adequate Justification For Its Failure To Undertake Rulemaking.

Non-emergency use and activity restrictions in parks which "result in a significant alteration in the public use pattern of the park area" routinely require rulemaking. 36 C.F.R. 1.5(b). As noted in the comments on this rulemaking, " the superintendent shall rely on notice and comment rulemaking for .. restrictions on use having a major impact on the visitor use pattern for all or a major portion of a park area." 48 Fed. Reg. 30261 (June 30, 1983) Restrictions in smaller parks are scrutinized, " a particular ... restriction in a small park unit may require rulemaking, even though the

same action would not if applied in a larger park with a different use pattern." 48 Fed. Reg. 30262.

The waterfront-focused park at Washington Harbour is extremely small and the dock in question is the sole publicly accessible water entry thereto. The overnight mooring restriction has completely eliminated a prior use pattern.

NPS took its action without any reasonable explanation as to why it did not utilize notice and comment rulemaking. It has subsequently defended this failure by claiming its action was a "permanent closure of a limited area within a park" not requiring rulemaking. A limitation on overnight mooring to two hours at a time, whatever else it might be, is not a permanent closure. Furthermore, even this limited restriction appears to violate the terms of the Deed of Easements requiring that NPS keep the easements, in this case the dock, "open to the public at all times." In its brief to the Court of Appeals, NPS asserted that the restriction was properly enacted without rulemaking because "[t]he focus of the regulation is clearly on the pattern of use by the total number of visitors to the area, not the degree of impact on certain uses by particular users." Yet, the interpretive commentary requires rulemaking where restrictions affect "visitor use patterns for all or a major portion of the park area." That language places its emphasis on the area which is impacted, not the number of users.

B. The Overnight Mooring Restriction Violates 36 C.F.R. 1.5(c) Because It Contains No Discussion of Less Restrictive Measures.

Assuming, *arguendo*, that NPS may regulate overnight mooring without rulemaking under the authority of 36 C.F.R. 1.5, this particular exercise of regulation must be reversed because NPS did not prepare a written determination justifying the action which contains an "explanation why less restrictive measures will not suffice," as required by 36 C.F.R. 1.5(c). This constraint governs even where rulemaking is not required.

This point does not need detailed analysis. The justification simply omits any discussion of less restrictive alternatives. It is difficult to conceive of a more obvious violation of 36 C.F.R. 1.5(c). For this reason, the overnight mooring restriction should be vacated and returned to NPS for consideration of less restrictive alternatives.

C.The Overnight Mooring Restriction Improperly Utilizes A Time Restriction To Regulate Activity.

Managers of national parks face a welter of competing proposals for use of park resources. These may come from recreational boaters, hikers, hunters, bikers, bird watchers, tour bus companies -- the list is endless. Many, if not all of the proposed activities to be undertaken in national parks, place potential strains on the parks.

The easy bureaucratic "solution" to such demands is simply to ban the uses by limiting the time in which they may be undertaken: no biking on weekends, no tour buses between dawn and midnight, no overnight mooring. However, NPS, in a refreshing burst of regulatory responsibility, prohibits

such mindless restriction. It has decreed that time restrictions should never be used to effect restrictions on activities.[2]

Unfortunately, this creative approach did not seep down from the clear print of the Federal Register to the National Capital Parks Region of the NPS. There was absolutely no examination of activity restrictions which might have the effect of limiting the adverse consequences envisioned in the "justification." The case for judicial deference to an agency's interpretation of its authority is less compelling with respect to interpretations which are inconsistent with previously held positions. *Bowen v. Georgetown University Hospital*, 488 US 204, 212, 109 S. Ct. 468, 473-474 (1988).

D.The Justification is Devoid of Germane Facts To Support its Conclusions.

The justification states numerous conclusions as the basis for restricting overnight mooring, including suppositions of purported harms or strains on park resources which stem from such use. There is a conclusion drawn that the docking area was not intended to be a marina, but no indication that the services of a marina are required for overnight docking, as they are surely not. No facts are adduced indicating that there have ever been problems with sewage disposal, noise, crime or the like.

---

[2] "Each of the five categories of control serves a specific purpose. A visiting hour restriction, for example, may not be imposed for the purpose of achieving an activity restriction." 48 Fed. Reg. 30261 (June 30, 1983).

No facts are cited which indicate that any problems arise from overnight mooring. A mere recitation of possible problems is not enough: "[s]tating that a factor was considered ... is not a substitute for considering it." *NTEU v. Horner*, 854 F.2d 490, 499 (D.C. Cir. 1988). Nor can either the District Court or this Court rescue NPS from its failures: "[the Court] may not supply a reasoned basis for the agency's action that the agency itself has not given." *Motor Vehicle Manufacturers Association of the United States v. State Farm Mutual Automobile Insurance Company*, 463 US 29, 43, 103 S. Ct. 2856, 2867 (1983).

CONCLUSION

Millions of acres of parkland are held in less-than fee interest, governed by thousands of agreements. These agreements, like the Deeds of Easement for Washington Harbour, provide essential land use management guidelines for important components of the National Park System. The decision below leaves these agreements in a legal limbo, creating the prospect that the National Park Service may ignore the terms of such agreements at its whim. This Court should resolve any question concerning the rights of members of the public who otherwise meet traditional tests of standing to be able to seek enforcement of these agreements. The Petitioner in this case clearly meets the traditional tests of standing; he has suffered a cognizable and concrete injury to a recreational interest; his damages are not speculative or hypothetical, and the courts can easily provide a remedy for

his grievance. Standing can only be denied if it is assumed that the Deed of Easements exists in a vacuum and has no public component. If a public park is not created for the benefit of the public, for whom is it created? The decision of the Court of Appeals denying Petitioner standing calls into question the very integrity of the process undertaken by Respondents in creating, negotiating and executing the Deed of Easements to create a National Park at Washington Harbour. The decision below opens the prospect that the Park Service can ignore the terms of Deeds of Easement, even when these Deeds have been adopted through a public process as part of the land management scheme controlling parklands. This prospect must be quashed.

The overnight mooring restrictions are fatally flawed. In clear violation of its own rules on public use limits, NPS did not hold a rulemaking, did not consider less restrictive alternatives, and used time restrictions to limit activities. The basis for the restrictions was never spelled out and the record is devoid of any facts which would support them. This Court should reverse the decision of the Court of Appeals affirming the decision of the District Court and order the Court of Appeals to order the District Court to vacate the overnight mooring restrictions.

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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Counsel for Petitioner

APPENDIX

Appendix A -- Opinion of the United States Court of Appeals for the District of Columbia dated May 31, 1995

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT
No. 94-5184 September Term, 1994

H. Jay Spiegel,
Appellant
v.
Bruce Babbitt, et al.,
Appellees

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Before: GINSBURG, SENTELLE, and RANDOLPH, *Circuit Judges*.

JUDGMENT

This appeal was considered on the record from the United States District Court for the District of Columbia, the briefs filed by the parties, and on the parties' oral arguments presented on May 16, 1995. The court has determined that the issues presented occasion no need for a published opinion. See D.C. Cir. Rule 36(b). It is

ORDERED AND ADJUDGED that the decision of the district court be affirmed with respect to Counts I and III, substantially for the reasons stated by the district court in its memorandum opinion and order filed May 27, 1994. The district court properly determined that the written determination prepared to justify the overnight docking restriction at Washington Harbor satisfies the requirement of 36 C.F.R. 1.15(c) and that rulemaking procedures were not required. Count III of the complaint fails because it is impermissibly vague. it is

FURTHER ORDERED that the portion of the district court's memorandum opinion and orders dated May 27, 1994, and June 30, 1994, deciding the merits of Count II be vacated and remanded. Appellant lacked standing to bring his claim concerning the commercial zone. The district court should therefore dismiss Count II of the complaint.

Bills of cost must be filed within 14 days after entry of judgment. The Court looks with disfavor upon motions to file bills of costs out of time.

The Clerk is directed to withhold issuance of the mandate herein until seven days after disposition of any timely petition for rehearing. See D.C. Cir. Rule 41.

Per Curiam
For the Court:
Mark J. Langer, Clerk

By: /s
Deputy Clerk

Appendix B - Memorandum Opinion and Order of the United States District Court for the District of Columbia dated May 27, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

H. JAY SPIEGEL,	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 94-0728
	)	(Stanley Sporkin)
BRUCE BABBIT,	)	
ET AL.	)	
Defendants.	)	

MEMORANDUM OF OPINION AND ORDER

Before this Court are Plaintiff's Motion for a Preliminary Injunction and Defendants' Motion for Summary Judgement. Based on the record and oral argument, the Defendants' Motion for Summary Judgment will be granted and the Plaintiff's Motion for a Preliminary Injunction will be denied.

I. The Facts

Defendants maintain a park area along the Potomac riverfront in the District of Columbia called Georgetown Waterfront Park, part of which includes the Washington Harbour. Georgetown Waterfront Park is part of the C&O Canal National Historic Park, which is administered by the

National Park Service and the United States Department of the Interior.

In 1985, several private owners and the United States government entered into a Deed of Easements which provided the National Park Service with a degree of control over a certain part of the Washington Harbour, including a fixed and floating wood dock which was to be constructed and maintained by two of the private owners. The parties to the Deed of Easements recognized that "the National Park Service has the responsibility for law enforcement and responsibility for regulating and controlling activities in said areas," including the fixed and floating wood dock. Deed of Easements, para. 18. According to the Deed, the easement area would "be kept open to the public at all times" and the area would not "be used for short term recreational, exhibit activities, seasonal restaurant use or commercial uses." Id. at para. 2.

At least as early as 1987, the fixed and floating wood dock was completed, along with the rest of the Washington Harbour Complex. Members of the public, including Plaintiff, began to moor their vessels at the Washington Harbour dock periodically and avail themselves of the use of the dock and the adjacent public access easement. According to Plaintiff, no rules or regulations were posted in 1987 concerning the use of the dock and the adjacent public access easement.

In 1991, signs were posted limiting mooring to two hours between the hours of midnight and 6 a.m. Prior to the adoption of this limitation, a small number of vessels had been staying at the dock through the night on Fridays and Saturdays in warmer weather with their occupants sleeping

onboard. Since 1991, Plaintiff and several other private boat owners who have attempted to moor their boats overnight at Washington Harbour have been ticketed or have been required to unmoor their boats during the night.

In 1992, the National Park Service designated a 100 foot section of the Washington Harbour dock for use exclusively by boats with commercial licenses to pick up and discharge passengers. Plaintiff, who desires to sleep overnight in his boat while moored at Washington Harbour, seeks a preliminary injunction enjoining the Park Service from enforcing the limited mooring rules.

II. Positions of the Parties

The plaintiff makes three arguments. First, he asserts that the National Park Service's limitation on overnight mooring at Washington Harbour was established in violation of the Park Service's own regulations, 36 C.F.R. §§ 1.5(b) and 1.5(c). According to Plaintiff, the Park Service failed both to prepare the requisite written justification for the limitation and to propose the limitation in the Federal Register. Second, Plaintiff claims that the Park Service's designation of 100 feet of the dock exclusively for the use of commercial use licensees violates the Deed of Easements. Last, Plaintiff alleges that the National Park Service has "violated the letter and spirit of the Deed of Easements by failing to strictly enforce all of the restrictions set forth in the Deed of Easements . . . ," which are allegedly too numerous to mention.

Defendants respond that the Park Service had, in fact, prepared the written justification contemplated by 36 C.F.R. § 1.5(c), and submit that the Federal Register notice

contemplated by § 1.5(b) is not applicable to the limitation at issue. Second, Defendants contest Plaintiff's standing to challenge the Park Service's designation of a section of the dock for vessels with commercial licenses, and assert that Plaintiff has not joined parties necessary for the just adjudication of his challenge. And finally, Defendants allege that Plaintiff's third claim fails to comport with Rule 8(a) of the Federal Rules of Civil Procedure.

III. Analysis and Decision

The Court finds no merit to Plaintiff's claims concerning the National Park Service's regulations. Pursuant to 36 C.F.R. 1. 5 (c) , the National Park Service must prepare a written determination justifying any non-emergency park restriction, condition, public use limit or closure. Contrary to plaintiff's assertion, such a written determination was prepared to justify the overnight docking restriction at Washington Harbour. The Superintendent of the C&O Canal National Historic Park, Thomas C. Hobbs, prepared a written determination explaining that such a limitation is necessary for several reasons, including "the maintenance of public health and safety, protection of environmental or scenic values, [and] protection of natural or cultural resources . . . ." Mr. Hobbs' justification explains that "[t] he Georgetown Waterfront Park was never intended nor was it ever designated . . . to be used for overnight accommodations." The Court finds that this written determination satisfies the requirement of 36 C.F.R. 1.5(c).

Plaintiff is also incorrect in his assertion that the National Park Service should have published the docking limitation in the Federal Register for notice and comment

because it "is of a nature, magnitude and duration that will result in a significant alteration in the public use pattern of the park area." See 36 C.F.R. 1.5(b). By Plaintiff's own admission, only a small number of boat owners moor overnight, doing so only occasionally during a few summer months. This Court is hard pressed to view this limited docking restriction as a "significant alteration" in the public use pattern of the park.

The National Park Service has Interpreted 36 C.F.R. 1.5(b) as not requiring Federal Register publication of the notice at issue here. The Park Service's interpretation of its own regulation is entitled to deference from this Court. Marymount Hospital, Inc. v. Shalala 19 F.3d 658 (D.C. Cir. 1994); Chevron U.S.A. Inc. V. Natural Resources Defense Council, 467 U.S. 837 (1984) . In a letter to the Plaintiff, the Assistant Solicitor of the National Capital Parks, Richard Robbins, explained that the Park Service does "not believe that [its] limited docking restriction constitutes a "significant alteration in the public use pattern of the park area" warranting publication in the Federal Register. . . ." See Exhibit 3 of Defendants' Motion to Dismiss. Such an interpretation is consistent with the Park Service's analysis which accompanied the publication of 36 C.F.R. 1.5:

> A permanent closure of a limited area within a park does not require the use of notice and comment procedures, unless it also has the effect of significantly altering or disrupting use by a substantial number of park visitors. . . Public notice and comment is not intended to apply to measures taken to achieve routine resource management objectives,

> such as construction, facility maintenance or rehabilitation, and routine practices which are aimed at preserving the viability, integrity and natural character of the park ecosystem.

48 Fed. Reg. 30,252, 30,261-30,262 (June 30, 1983). Accordingly, Plaintiff's arguments regarding the Park Service's regulations are without merit.

Next, Plaintiff's contention that the Park Service has violated the Deed of Easements by allowing commercial tour boats to pick up and drop off passengers at the Washington Harbour dock is in error. Paragraph 2 of the Deed of Easements prohibits "commercial uses" of the easement area, and Paragraph 18 provides "that the National Park Service shall not conduct nor permit commercial activities in such areas." Allowing passengers to embark and disembark from boats is not a commercial activity. The Deed of Easements speaks to the activity, not the entity conducting the activity.

The notion that docking rights at the Washington Harbour are effectively closed to all members of the public except those wealthy enough or lucky enough to own or sail on a private boat is unconscionable. That passengers pay for the right to ride on the tour boats is irrelevant to whether they, as members of the public, have the right to use the dock at Washington Harbour. Of course the National Park Service can allow large passenger boats to moor briefly at the Washington Harbour dock to allow their passengers to embark and disembark and enjoy the park's benefits.

Pursuant to its authority to regulate and control activities in the easement area (see Deed of Easements, para. 18) the Park Service has the authority to set aside a certain portion of the dock for the exclusive use of the commercial

passenger boats, benefitting the public at large. Such regulation maximizes the safety, order, and enjoyment of the greatest number of park visitors who arrive by water.

The Plaintiff's last claim in his complaint fails because of its vagueness:

> The Park Service has violated the letter and spirit of the Deed of Easements by failing to strictly enforce all of the restrictions set forth in the Deed of Easements concerning the public access easements which are under the jurisdiction of the National Park Service. These violations are too numerous to mention specifically.

This claim does not comport with Rule 8 of the Federal Rules of Civil Procedure. It does not give the defendant "fair notice of what the plaintiff's claim is and the grounds upon which it rests." Conley v. Gibson, 355 U.S. 41, 47 (1957).

For all of the above reasons, Plaintiff's Motion for a Preliminary Injunction will be denied and Defendants' Motion for Summary Judgment will be granted. An appropriate order accompanies this memorandum.

Date: 5/27/94

/s

Stanley Sporkin
United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

		FILED
H. JAY SPIEGEL	)	MAY 27 1994
Plaintiff	)	Clerk U.S. District
	)	Court
	)	District of Columbia
v.	)	
	)	
BRUCE BABBIT,	)	Civil Action No. 94-
ET AL.,	)	0728
Defendants.	)	(Stanley Sporkin)

ORDER

Upon consideration of Plaintiff's Motion for a Preliminary Injunction and Defendants' Motion for Summary Judgment, all opposition thereto, oral arguments and for the reasons stated in the foregoing Memorandum Opinion, it is hereby

ORDERED that Plaintiff's Motion for a Preliminary Injunction is hereby denied, and further

ORDERED that Defendants' Motion for Summary Judgment is hereby granted, and further

ORDERED that this action be dismissed.

Entered this 27 day of May, 1994.

/s/
Stanley Sporkin
United States District Court

Robert L. Shapiro
Assistant United States Attorney
555 4th Street, N.W., 10th Floor
Washington, D.C. 20001

H. Jay Spiegel
703 King Street
Alexandria, Virginia 22314

Appendix C - Memorandum Opinion and Order on Motion to Vacate of the United States District Court for the District of Columbia dated July 1, 1994

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

		FILED
H. JAY SPIEGEL,	)	JUL 1 1994
Plaintiff	)	Clerk U.S. District Court
	)	District of Columbia
v.	)	
	)	
BRUCE BABBIT,	)	Civil Action
Et. Al.,	)	No. 94-0728
Defendants.	)	(Stanley Sporkin)

MEMORANDUM OPINION AND ORDER

Before this Court is Plaintiff's Motion to Vacate Order Granting Defendants' Motion for Summary Judgement and Further Request for Preliminary Injunctive Relief, and Defendants' response thereto. Based on the record, the Plaintiff's motion will be denied.

While plaintiff alleges several "material errors in fact and law which have affected the correctness of the Decision," this Court finds none of his arguments persuasive. Only one issue merits comment by the Court at this time. In both his Motion for Preliminary Injunction and his most recent motion, Plaintiff argues that the Park

Service violated the Deed of Easements at issue in the case by allowing commercial tour boats to pick up and drop off passengers at the Washington Harbor dock. Paragraph 2 of the Deed of Easements prohibits "commercial uses" of the easement area, and Paragraph 18 provides "that the National Park Service shall not conduct nor permit commercial activities in such areas." In its recent decision, this Court ruled that allowing passengers to embark and disembark does not constitute commercial activity.

In his most recent motion, Plaintiff cites for the first time United States V. Carter, 339 F. Supp. 1394 (D. Ariz 1972). While at first glance, the facts in Carter may resemble those in the instant case, such resemblance is only superficial. In Carter, the defendant rented boats to the public outside of the national park, towed them through the national park, and launched them from the national park's launch, for use in water that was considered part of the national park. Id. at 1396 ("Both the land and water area of Glen Canyon National Recreation Area are part of the 'national park system.' ") In other words, the land, launch, and water of the national park were necessary prerequisites that formed the backstay of the defendant's business. Each boat rental by defendant required him to enter and perform services in the national park (e.g. towing, launching).

In the instant case, commercial boats have obtained licenses to dock briefly at Washington Harbour to pick up and discharge passengers. The tour boats at issue pull up to the water entrance of Washington Harbour; they do not enter or cross the national park area. Unlike Carter, the tour boat operators participate in no activity in the national park area itself. Nevertheless, Plaintiff argues that Carter

applies because the passengers of the boat operators must cross the national park to board the boats. Such an argument is untenable. If the Court followed such reasoning, taxis and tour busses would also be precluded from picking up or dropping off paying passengers at entrances to national parks. The embarkment and disembarkment of paying passengers at park entrances do not constitute commercial activity within a park.

Accordingly, Plaintiff's Motion to Vacate is denied. An appropriate order accompanies this memorandum.

Date: June 30, 1994

/s
Stanley Sporkin
United States District Court

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

FILED

H. JAY SPIEGEL,	)	**JUL 1 1994**
Plaintiff	)	**Clerk U.S. District Court**
	)	**District of Columbia**
v.	)	
	)	
BRUCE BABBIT,	)	Civil Action
ET AL.,	)	No. 94-0728
Defendants.	)	(Stanley Sporkin)

ORDER

Upon consideration of Plaintiff's Motion to Vacate Order Granting Defendant's Motion for Summary Judgment and Further Request for Preliminary Injunctive Relief, Defendants' response thereto, and for the reasons stated in the foregoing Memorandum Opinion, it is hereby

ORDERED that Plaintiff's Motion to Vacate Order Granting Defendant's Motion for Summary Judgment and Further Request for Preliminary Injunctive Relief is hereby denied.

Entered this 30th day of June, 1994.

/s
Stanley Sporkin
United States District Court

Appendix D -- Order of the United States Court of Appeals for the District of Columbia dated July 18, 1995 Denying Petition for Rehearing

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5184
September Term, 1994
USDC CV 94-0728

United States Court of Appeals
For the District of Columbia Circuit
FILED JUL 28 1995

H. Jay Spiegel,
Appellant,

v.

Bruce Babbitt, in his capacity as
Secretary of the U. S. Department of the Interior,

Appellee

BEFORE: Ginsburg, Sentelle and Randolph, Circuit Judges

ORDER

Upon consideration of appellant's petition for rehearing filed July 14, 1995, it is

ORDERED, by the Court, that the petition is denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY:
/s
Robert A. Bonner
Deputy Clerk

Appendix E -- Order of the United States Court of Appeals for the District of Columbia dated July 18, 1995 denying Suggestion for Rehearing *En Banc*

United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 94-5184 **September Term, 1994**
USDC CV 94-0728

United States Court of Appeals
For the District of Columbia Circuit
FILED JUL 28 1995

H. Jay Spiegel,
Appellant,

v.

Bruce Babbitt, in his capacity as
Secretary of the U. S. Department of the Interior,
Appellee

BEFORE: Edwards, Chief Judge; Wald, Silberman, Buckley, Williams, Ginsburg, Sentelle, Henderson, Randolph, Rogers and Tatel, Circuit Judges

ORDER

Appellant's Suggestion For Rehearing In Banc has been circulated to the full Court. No member of the Court

requested the taking of a vote thereon. Upon consideration of the foregoing It is

ORDERED, by the Court in banc, that the suggestion is denied.

Per Curiam

FOR THE COURT:
Mark J. Langer, Clerk

BY: /s
Robert A. Bonner
Deputy Clerk

Appendix F - Department of the Interior Land Acquisition Guideline NPS-25 (Excerpt, page 5.)

LAND ACQUISITION POLICY IMPLEMENTATION GUIDELINE

NPS-25 Chapter 1

Individual Park Area Acquisition Plan Page 5

- Clear and significant damage to natural, scientific, or cultural resources including topographic changes or disruptions of natural drainage patterns, or disturbance of natural vegetation or wildlife.

- Creation of hazards that endanger the safety of park visitors.

- Major increase in commercial use or traffic at access or crossing points on main park roads, resulting in hazardous conditions.

If the landowner persists in the identified incompatible use the Service will initiate a request for acquisition.

6. Alternatives To Fee Acquisition

Full consideration will be given to all types of land protection methods such as fee acquisition, scenic easements, zoning, cooperative management, rights-of-way acquisition, or other alternatives. The land protection

methods used will be discussed in the individual land acquisition plan.

Scenic easements or other less-than-fee interests shall be described in terms of the degree of protection required to meet the resource management and visitor use needs of the park area. The terms of the scenic or other easement estate to be acquired should be included in the plan to the degree possible.

Property owners within park area boundaries are responsible for complying with whatever local zoning or development controls are in effect. The park manager should encourage property owners to discuss proposed changes in ownership or structural improvements to the property with him/her.

Private access to or through park areas sometimes must be limited or eliminated in order to assure adequate resource protection and visitor safety. The plan must identify those points or routes of access to or through park property which may be eliminated and the conditions under which this may occur. Before any limitation on or elimination of access the Service shall take steps to locate alternate means of access to the private property and compensate the property owners for any access that is required.

Appendix G - Excerpts from Transcript of hearing before the United States District Court for the District of Columbia, April 18, 1994, pages 14-15

Page 14

1 were doing in the way that's required by the due process

2 requirements of the Fifth Amendment.

3 THE COURT: Thank you very much. Let me hear from

4 the -- yes.

5 MR. SHAPIRO: Your Honor, as this case is currently

6 presented In the papers that have been filed in Court, it's

7 really a very narrow case. Mr. Spiegel today has put forward

8 any number of allegations, but the complaint only has three

9 counts. The first count is essentially what the Court termed

the no parking count that limits docking of a boat to a

maximum two hour period between the hours of midnight and 6:00

a.m.

And plaintiff has made really only one complaint

here with regard to the no parking, which is that the Interior

Department didn't follow Its own regulations in 36 CFR Section

1.5. Primarily Mr. Spiegel claims that this regulation

requires the Park Service to have promulgated this through a

notice procedure In the Federal Register. That simply isn't

the case.

The Park Service has any number of regulations of

this type that are put In place through a simple signage. The

22 regulation in question only refers to significant changes in

23 the public use pattern.

24 Mr. Spiegel has admitted that there are a small

25 number of boats who ever had any desire to dock there

Page 15

1 overnight. There are many thousands of people who use this

2 park.

3 THE COURT: Why did they put that regulation in,

4 though? I mean, first they said -- they banned the parking

5 for all overnight parking and then they do it for two hours.

6 What happened here? Why did they do that?

7 MR. SHAPIRO: The record does not state entirely.

What the record states is that the initial signage that prohibited parking entirely during the night was placed there in error. The record does not reflect how that error occurred.

The record does have attached to our motion for summary judgment the justification for the restriction that is at issue here, the two hour maximum between midnight and 6:00.

THE COURT: What is the justification? Refresh my recollection.

MR. SHAPIRO: That's Exhibit 2 to our motion.

THE COURT: What is it? Is that the affidavit of that --

MR. SHAPIRO: It's not in an affidavit form. It's

written by Mr. Hobbs, who is the superintendent of that park area.

THE COURT: What does he say?

MR. SHAPIRO: He explains the concerns over both the sanitation at issue at the park as well as safety at the park,

Appendix H - Affidavit of Petitioner, dated March 30, 1994

AFFIDAVIT

CITY OF ALEXANDRIA :

: ss

COMMONWEALTH OF VIRGINIA :

The undersigned, H. Jay Spiegel, being duly sworn hereby deposes and says:

1. I am making this affidavit in support of the Motion for Preliminary Injunction which I have filed concurrently herewith in the United States District Court for the District of Columbia.

2. I am a citizen of the Commonwealth of Virginia, residing in Arlington, Virginia. I am an attorney and a member of the Bar of the District of Columbia, Bar No. 405644, in good standing, but I am not admitted to the Bar of the United States District Court for the District of Columbia.

3. I have owned and operated boats during the boating season on the Potomac River in the District of Columbia since August, 1986 and to-date.

4. Since early 1987, I have visited, by boat, the Washington Harbour dock in the District of Columbia,

mooring my vessel, at various times, at all areas of the Washington Harbour dock, including in the northern 100 feet of the dock as well as in other areas of the dock.

5. From early 1987 through the beginning of the summer of 1991, I habitually moored vessels owned by me at the Washington Harbour dock on various days of the week and at various times of day during each day, including, weather permitting, at least one night per week during which night I moored my vessel overnight at least between the hours of midnight and 6:00 AM at the Washington Harbour dock.

6. The pattern of use described in paragraph 5 above consistently occurred from early 1987 through October 25, 1988, and from October 25, 1988 through the early summer of 1991.

7. Until early summer, 1991, the undersigned was unaware of any enforcement, by any authority figure or by anyone having color of authority, of any rules and regulations on the Washington Harbour dock concerning overnight mooring. Furthermore, the undersigned was not actually made aware of the jurisdiction of the National Park Service over the Washington Harbour dock and adjacent easements until signs were placed at the Washington Harbour dock in the early summer of 1991.

8. After the above-described signs were installed on the Washington Harbour dock, sporadic efforts at enforcing overnight mooring restrictions set forth in the signs

occurred and on a number of occasions, including, specifically, on October 15, 1992 and July 4, 1993, the undersigned was ordered, by persons claiming authority, to unmoor his vessel while peacefully moored at the Washington Harbour dock between the hours of midnight and 6:00 AM.

9. In July 1992, the undersigned was made aware that the National Park Service had granted several commercial use licenses permitting commercial vessels to moor at the Washington Harbour dock to pick up and discharge paying passengers. In August 1992, official National Park Service signs were placed on a 100 foot section of the northern end of the Washington Harbour dock restricting mooring at that location to "commercial use licensees".

10. On numerous occasions, including, specifically, on May 30, 1993, the undersigned has been ordered, by persons claiming color of authority, to unmoor the undersigned's vessel from that area of the Washington Harbour dock which has been restricted by the National Park Service for exclusive use by commercial use licensees. On each such occasion, the undersigned has unmoored his vessel, under protest, and after specifically informing the persons claiming color of authority that the commercial use zone is not legal under the Deed of Easements.

11. At times when the undersigned has moored his vessel overnight at the Washington Harbour dock between the hours of midnight and 6:00 AM, other pleasure

boats have also been concurrently moored, sometimes as many as 6 to 8 vessels. Furthermore, at times when the undersigned has elected to anchor his vessel in the Potomac River adjacent Theodore Roosevelt Island, in full view of the Washington Harbour dock, the undersigned has observed other pleasure boats peacefully moored between the hours of midnight and 6:00 AM at the Washington Harbour dock.

12. Furthermore, the undersigned has observed pleasure boats other than those owned by the undersigned moored at the northern end of the Washington Harbour dock which has now been designated for the exclusive use of commercial use licensees. On such occasions, the undersigned has observed persons claiming color of authority ordering the owners of such pleasure boats to remove their vessels from the commercial use zone.

13. Finally, in a telephone conversation on March 25, 1994 with Sergeant Jerry Swanson of the District of Columbia Harbor Patrol, the undersigned read to him, verbatim, the eight numbered paragraphs as set forth on pages 6 and 7 of the Brief attached hereto, and Sergeant Swanson informed the undersigned that were he to be subpoenaed to testify in the matter for which this Affidavit was executed, his testimony would include the statements set forth in the above-mentioned paragraphs numbered one through eight inclusive.

Further Affiant Sayeth Not.

/s
H. Jay Spiegel

Sworn to before me this 30th day of March, 1994.

/s
April D. Rossi
Notary Public
My Commission Expires: 9-30-96

Appendix I - Letter from Robert Stanton, Regional Director, National Capital Region, to Mr. Michael N. Williams, Vice President, Washington Harbour Management Corp., dated July 15, 1994

United States Department of the Interior

NATIONAL PARK SERVICE
National Capital Region
1100 Ohio Drive, SW.
Washington, D.C. 20242

L3O(NCR-CHOH)

JUL 15 1994

VIA FACSIMILE AND U.S. MAIL

Mr. Michael N. Williams
Vice President
Washington Harbour Management Corp.
3000 K Street, NW., Suite 125
Washington, D.C. 20007

Dear Mr. Williams:

This responds to your letters of June 6, 1994, to Acting Superintendent Terrie Savering, C&O Canal National Historical Park, and June 16, 1994, to me regarding the 1985 Deed of Easement at Washington Harbour.

We appreciate that no dispute exists regarding the terms of the Deed of Easement between Washington Harbour Associates and the United States of America. The terms of the Deed of Easement are clear in delineating the nature of activities that may be allowed at the various parcels at Washington Harbour. And, the restrictions of the Deed of Easement, which originated back in 1985, have been well known for many years by all of the parties.

As you also know, on May 27,1994, United States District Judge Stanley Sporkin ruled in favor of the National Park Service in Spiegel v. Babbitt, Civil No. 94-728 (D.D.C.). While the Court upheld the National Park Service's overnight mooring restrictions and commercial use licenses at Washington Harbour, the Court dismissed Mr. Spiegel's complaint about alleged violations of the Deed of Easement only because his allegation was too vague. And, while the case has been dismissed by the Court, Mr. Spiegel continues to complain about violations of the Deed of Easement.

With this in mind, I have had extensive discussions with regional and park staff members as well as our attorneys with the goal toward reaching a reasonable and legal resolution. At your request, we also discussed the possibility of a modest amendment of the Deed of Easement that would allow activities that are currently prohibited.

Such an amendment, however, would require the National Park Service to submit any proposed changes to a public review process, including scheduling public meetings in connection with preparation of an environmental

assessment. Further, it must take into account not only public support for proposed changes but also those who would oppose such amendments. In that regard, during the original process of establishing the 1985 Deed of Easement, there was considerable opposition to the Washington Harbour development and the National Park Service's easement. In fact, several citizen groups unsuccessfully sued the National Park Service over this very issue. Committee of 100 on Federal City v. Hodel, 777 F.2d 711 (D.C.Cir. 1985).

Further, as this issue has gained more notoriety, our office as well as the C&O Canal National Historical Park have received other inquiries. These inquiries are from individuals seeking to ensure that we not only continue to enforce the Deed of Easement restrictions but also leave it unaltered. As such, the National Park Service is reluctant at this time to proceed with the process of seeking to amend the Deed of Easement.

As you know, as managers of Washington Harbour, you are responsible for ensuring that the conditions agreed upon in the 1985 Deed of Easement are adhered to by the tenants. If you deem it necessary, however, you may contact the National Park Service for assistance in resolving disputes and providing clarification on questions relating to the Deed. In that regard, we must reaffirm Acting Superintendent Savering's letter to Mr. Wilson on May 20, 1994, and her subsequent telephone conversation. Further, after conferring with our attorneys, we do not believe that we may allow tables to be placed in the grassy portion of Parcel 1, insofar as it is clearly not adjacent to the water feature as required

under the Deed of Easement. As such, we ask that you ensure that no tables are placed in that area.

Within Parcel 4, we again ask that you ensure that the canopied bar, located on the lower terrace adjacent to the boardwalk area, is removed. Paragraph 1(d) of the Deed of Easement allows "[d]uring inclement weather only, open-sided tents ... provided such tents do not cover an area greater than 1000 square feet and are located underneath the tree canopy." The canopied bar, with four corner poles firmly placed into the ground, is not temporary in nature and appears to be a year round structure. The provision allowing for tents during inclement weather was made to allow for occasions when indoor events might spill out onto the upper terrace. It was never intended to allow for the creation of a permanent structure, open-sided or not.

I truly appreciate your concerns on this matter. However, we believe that compliance with the clear terms of the Deed of Easement still affords Washington Harbour's restaurants public table space. In that regard, the Deed of Easement allows outdoor seasonal restaurant use in the area surrounding the water feature. By maximizing the square footage allowed for dining within this area, we believe that concerns regarding the possible loss of jobs and revenue should be greatly minimized.

If you wish, I have asked Associate Regional Director for Land Use Coordination, John G. Parsons and his staff to meet with you to discuss and clarify this and the additional conditions of the Deed of Easement. You can telephone Mr. Parsons at (202) 619-7025 to schedule such a meeting.

While I realize that our response is not what Mr. Cibel was hoping to receive, we frankly believe that we have no choice but to insist on compliance with the clear language of the Deed of Easement.

Sincerely,

/s

Robert Stanton
Regional Director,
National Capital Region

Enclosure

Appendix J - Excerpts from Deed of Easements between Washington Harbour Associates, a District of Columbia partnership , Georgetown Potomac Company (formerly Georgetown-Inland Corporation), a Delaware corporation, Mount Clare Properties (D.C.) Inc., a Maryland corporation and the United States of America, dated January 7, 1985

DEED OF EASEMENTS
(PERTINENT PAGES)

(Page 1)

THIS DEED, made this 7th day of January, 1985 by and between WASHINGTON HARBOUR ASSOCIATES, a District of Columbia partnership (herein "WHA"), GEORGETOWN POTOMAC COMPANY (formerly Georgetown-Inland Corporation), a Delaware corporation (herein "Georgetown Potomac"), MOUNT CLARE PROPERTIES (D.C.) INC., a Maryland corporation (herein "Mount Clare") and the UNITED STATES OF AMERICA.

WITNESSETH:

WHEREAS, WHA is developing certain property in the District of Columbia known as Lot 102, Square 1173; and

WHEREAS, fee simple title to said Lot 102 is vested in Georgetown Potomac which is wholly owned by WHA; and

WHEREAS, WHA desires to improve or cause to be improved Lot 81, Square 1171 and Lot 97, Square 1172; and

WHEREAS, fee simple title to said Lots 81 and 97 is vested in Mount Clare, a wholly-owned subsidiary of CSX Resources, Inc.; and

WHEREAS, Lot 81, Square 1171 and Lot 97, Square 1172 are subject to a restrictive covenant set forth in a certain
deed recorded November 26, 1941 in Liber 7694 at folio 573 between the Surviving Receivers of the Chesapeake and Ohio Canal Company and the Real Estate and Improvement Company of Baltimore City; and

WHEREAS, the said covenant restricts the height of buildings or structures on said lands to twenty (20) feet or one (1) story and runs in favor of property owned by the United States; and

WHEREAS, WHA desires to secure the release of said covenant; and

WHEREAS, the United States will release the said covenant in exchange for certain easements and other considerations as set forth herein.

WHEREAS, the Secretary of Interior or his duly authorized representative is authorized by Section 5(b) of Public Law 90-401, approved July 15, 1968, as amended, to make exchanges of land or interests in land provided the exchange of property shall be approximately equal or if not equal the values shall be equalized by the payment of cash; and

WHEREAS, it has been determined that land and interests in land are approximately equal.

NOW THEREFORE, the parties hereto do hereby grant, convey, covenant and agree as follows:

1. Georgetown Potomac does hereby grant and convey, in perpetuity, unto the United States of America and its assigns a scenic easement in gross in that part of Lot 102, Square 1173 as described and depicted in Exhibits A-1 thru A-6 attached hereto and made a part hereof, said easement to be of the nature and character and to the extent hereinafter expressed to be, and to constitute, a servitude upon said lands and to that end, Georgetown Potomac and WHA covenant on behalf of themselves, their successors and assigns, with the United States and its assigns, to do or refrain from doing the various acts hereinafter described, it being hereby agreed and expressed that the doing and refraining from said acts, and each thereof, upon said lands are and will be for the benefit of the United States.

The restrictions hereby imposed on the said easement area and the acts which Georgetown Potomac and WHA covenant to do and refrain from doing are as follows:

(a) Within Parcel No. 1 as depicted on Exhibit A-3 there shall be permitted only the following: a major water feature; fountains; plantings; walkways; street furniture; lighting; a project directory; flood control devices; paving; short-term recreational and exhibit activities; and seasonal

seasonal restaurant uses and short term recreational and exhibit activities. In this area sufficient trees shall be provided to form a tree canopy covering the entire area. During inclement weather only, open-sided tents will be permitted provided such tents do not cover an area greater than 1,000 square feet and are located underneath the tree canopy.

(e) Within Parcels No. 1, 2, 3 and 4 no signs shall be permitted within the easement area except those which are attached to buildings immediately adjacent thereto. All such signs shall conform to the Sign Criteria attached hereto as Exhibit K. No more than four (4) signs will be permitted on the building facades which face the Potomac River and these signs shall be located on the level at which restaurant and retail use is located. Notwithstanding the foregoing, a project directory and temporary non-commercial public information signs no higher than 6 feet from grade may be placed in the easement area.

2. Georgetown Potomac does hereby grant and convey unto the United States, and its assigns, an easement in gross in that part of Lot 102, Square 1173 as described and depicted in Exhibits B-1 and B-2 attached hereto and made a part hereof, said easement to be of the nature and character and to the extent hereafter expressed to be, and to constitute, a servitude upon said lands and to that end, and for the purpose of accomplishing the intent of the parties hereto, Georgetown Potomac and WHA covenant on behalf of themselves, and their successors and assigns, with the United States, and its assigns, to do and refrain from doing upon said lands the various acts hereinafter described, it being agreed and expressed that the doing and refraining from said acts, and each thereof, upon said lands are and will be for the benefit of the United States. The restrictions hereby imposed upon said easement area and the acts which Georgetown Potomac and WHA covenant to do and refrain from doing are as follows:

(Page 5)

(a) The easement area shall contain no structures except as otherwise herein expressly permitted.

(b) The easement area shall be improved with paving, plantings, walkways, street furniture, lighting, a project directory and a seawall.

(c) The easement area shall be kept open to the public at all times.

(d) The easement area shall be reasonably maintained and kept in reasonably good repair so as to accommodate its intended use.

(e) The easement area shall not be used for short term recreational, exhibit activities, seasonal restaurant use or commercial uses.

3. Mount Clare does hereby grant and convey, in perpetuity, unto the United States and its assigns a scenic easement in gross in those parts of Lot 81, Square 1171 and Lot 97, Square 1172 as described and depicted on Exhibits C-1, C-2, D-1 and D-2, respectively, attached hereto and made a part hereof, said easement to be of the nature and character and to the extent hereinafter expressed to be, and to constitute, a servitude upon said lands, and to that end, and for the purpose of accomplishing the intent of the parties hereto, Mount Clare and WHA covenant on behalf of themselves, their successors and assigns, with the United States and its assigns, to do and refrain from doing upon said lands the various acts hereinafter described, it being hereby agreed and expressed that the doing and refraining from said acts, and each thereof, upon said lands are and will be for the benefit of the United States. The restrictions hereby imposed upon said lands and the acts which Mount Clare and WHA covenant to do and refrain from doing are as follows:

(a) The easement area described and depicted on Exhibits C-1 and C-2 shall be kept free of structures and limited

successors or assigns shall not be required to maintain such improvements if the cost of such maintenance would increase the then current cost of maintenance under the initially approved plan by more than 5%.

9. (a) Mount Clare for itself and its successors and assigns covenants with the United States that, within the area

formerly constituting Virginia Avenue located between Rock Creek and 30th Street, N.W. as described and depicted in Exhibits I-1 and I-2, no structure shall be erected other than (I) an enclosed glass conservatory, not exceeding fifty-two (52) feet in height, with supporting structure linking the buildings adjacent to the said area, and (ii) projections and architectural appurtenances of the said adjacent buildings. The covenants set forth in this Paragraph 9 shall be deemed real covenants and shall run with the land known as Lot 81, Square 1171 and Lot 97, Square 1172.

(b) Mount Clare does hereby grant and convey, in perpetuity, unto the United States easements in gross of those parts of the said area formerly constituting Virginia Avenue so as to provide a continuation of the easements granted in Paragraphs 3 and 4 hereof. The said easements shall be of the same nature and character of easement granted in Paragraphs 3 and 4 and subject to the same restrictions. The easement area subject to the restrictions of

Paragraph 3 is described and depicted on Exhibits I-5 and I-6. The easement area subject to the restrictions of Paragraph 4 is described and depicted on Exhibits I-3 and I-4.

10. Georgetown Potomac and WHA covenant for themselves and their successors and assigns, with the United States and its assigns that, in that part of the Potomac River as described and depicted in Exhibit J-1 and J-2 attached hereto and made a part hereof, they will construct and maintain in reasonably good condition a fixed and floating wood dock, the plans for which

(Page 10)

shall be approved by the National Park Service, and construct and maintain in reasonably good condition improvements for mooring boats and pedestrian access in conjunction with the pedestrian access provided on the adjacent area along the south line of Lot 102, Square 1173. In the event of destruction of the dock, Georgetown Potomac and WHA their successors and assigns will, except for cause beyond their control, begin reconstruction within 90 days. The area may also be used to extend the sea wall erected along the property line of Lot 102, Square 1173 provided that the sea wall shall not occupy more than 1,600 square feet beyond the property line adjacent to the basin area within said Lot 102. In the event of destruction of the boardwalk, Georgetown Potomac and WHA will, except for cause beyond their control, begin reconstruction within 90 days.

Georgetown Potomac and WHA covenant for themselves and their successors and assigns with the United States and its assigns that they will provide, maintain and keep in force at all times insurance in which the United States of America shall be named as an additional name insured covering the easement area granted in this Paragraph 10 with not less than the following minimum limits of liability:

(a) Public Liability Insurance: For bodily injuries or death sustained by one (1) person $1,000,000 with a total limit of liability for bodily insuries [sic] or death sustained by more than one (1) person in any one (1) accident $3,000,000.

(b) Property Damage Insurance: For any one (1) accident, $200,000 and $500,000 aggregate.

(c) In order to adjust for inflation, the National Park Service may at five (5) year intervals, increase the limits of liability. In the event of disagreement as to the increased limits, the new limits shall be established by applying the

increase in the Consumer Price Index, to the original limits and rounding to the nearest $10,000.

The covenants set forth in this Paragraph 9 shall be deemed real covenants and shall run with the land known as Lot 102, Square 1173.

11. The United States does hereby release that certain covenant set forth in a deed hereinbefore mentioned which restricts the height of buildings or structures on Lot 81, Square 1171 and Lot 97, Square 1172.

12. Mount Clare and WHA covenant for themselves their successors and assigns with the United States and its assigns that buildings or structures erected on Lot 97, Square 1172 and Lot 81, Square 1171 shall be subject to the following restrictions:

(a) On Lot 97, Square 1172, any building or structure shall not exceed fifty-two (52) feet in height and its penthouse shall not exceed five (5) feet in height and shall not cover more than three hundred (300) square feet. Architectural embellishments and decorative and functional chimneys, approved by the National Park Service but in no event taller than six (6) feet may be erected above fifty-two (52) feet.

(b) On Lot 81, Square 1171, any building or structure shall not exceed sixty (60) feet in height and its penthouse and architectural embellishments shall conform to the limitations of the District of Columbia Zoning Regulations.

The covenants set forth in this Paragraph 12 shall be deemed real covenants and shall run with the land known as Lot 81, Square 1171 and Lot 97, Square 1172.

13. Mount Clare and WHA covenant for themselves and their successors and assigns with the United States and its assigns that

(Page 12)

they will rehabilitate the Chesapeake and Ohio Canal Tidal Lock in accordance with the specifications attached hereto as Exhibit L, provided that such rehabilitation shall not extend beyond ten (10) feet from each gate at the Tidal Lock, Mount Clare and WHA further covenant that they will remove the concrete spoil from the Potomac River along the seawall between the Thompson Boat House and 30th Street, N.W. and will within said area replace portions of the seawall which are structurally unsound with concrete cribbing ties to patch the existing seawall. It is understood by the parties that the obligations contained in this paragraph do not include maintenance.

14. The easement area established herein may be occupied and used for all purposes incidental to the construction or reconstruction of buildings and structures to be constructed or reconstructed adjacent to the said easement areas in accordance with such terms and conditions as may be approved by the National Park Service, which approval shall not be unreasonably withheld.

15. Mount Clare does hereby grant and convey, in perpetuity, unto the United States and its assigns an easement in gross in those parts of Lot 81, Square 1171 as described and depicted on Exhibits M-1 and M-2, respectively, attached hereto and made a part hereof, said

easement to be of the nature and character and to the extent hereafter expressed to be, and to constitute, a servitude upon said lands, and to that end, and for the purposes of accomplishing the intent of the parties hereto, Mount Clare covenants on behalf of itself, its successors and assigns, with the United States and its assigns, to do and refrain from doing within the said easement area the various acts hereinafter described, it being agreed and expressed that the doing and refraining from said acts, and each thereof, within said easement area are and will be for the benefit of the United States.

(Page 14)

Mount Clare and WHA covenant to do and refrain from doing are as follows:

(a) The easement area shall be kept free of structures.

(b) The easement area shall be improved in accordance with plans as may be approved by the National Park Service.

(c) The easement area shall be kept open to the public at all times.

(d) The easement area shall be reasonably maintained and kept in reasonably good repair so as to accommodate its intended use.

The parties recognize that a prior easement involving a portion of the easement area granted herein was granted to the District of Columbia. The covenants contained in this Paragraph 16 shall be deemed real covenants and shall run with the land known as Lot 81, Square 1171.

17. The United States hereby grants and conveys to Mount Clare and its successors and assigns a perpetual easement on and over Lot 801 [sic], Square 1172 immediately adjacent to the property line between Lot 97, Square 1172 and Lot 801 [sic], Square 1172 [sic] solely for the purpose of permitting building projections within an area not exceeding 75 square feet at any level.

18. The parties recognize that the National Park Service will administer all areas required herein to be kept open to the public at all times as areas of the National Park System, provided that the National Park Service shall not conduct nor permit commercial activities in such areas. The parties further recognize that the National Park Service has the responsibility for law enforcement and responsibility for regulating and controlling activities in said areas.

Appendix K - Justification for Public Use Limit-Docking Privileges at Washington Harbor

In accordance with Title 36 Code of Federal Regulations, Section 1.5 (a) (1) The docking of boats at the Georgetown Waterfront Park, Washington Harbor is limited to two hours from 12 Midnight until 6 AM.

Justification:

Title 36 Code of Federal Regulations, Section 1.5 (a) (1) allows the Park Superintendent to establish for all or a portion of a park area, a reasonable schedule of visiting hours, impose public use limits or close all or a portion of a park area to all public use or to a specific use or activity.

36 CFR 1.5 Section (b) establishes the requirement for public notification. The section states "Except in emergency situations a closure, designation, use or activity restriction or condition, or the termination or relaxation of such, which is of a nature, magnitude and duration that will result in a significant alteration in the public use pattern of the park area, adversely affect the park's natural, aesthetic, scenic or cultural values, require a long term or significant modification in the resource management objectives of the unit, or is of a highly controversial nature, shall be published as rulemaking in the Federal Register.

In 1987 the National Park Service held public hearings concerning the Georgetown Waterfront Park Plan. The draft plan was reviewed and supported by various official agencies at public hearings. In addition citizen involvement

opportunities occurred when the draft plan was put before the Advisory Neighborhood Commission E-2, Citizens Association of Georgetown, the C&O Canal N.H.P. Advisory Commission and the Foggy Bottom Citizens Association.

The 1987 Georgetown Waterfront Park Plan clearly states in item # 7 Provide Limited Docking For Transient Boats: "Limited public docking space will be provided east of the Wisconsin Ave. axis. This will offer an opportunity for all types of boaters to visit the park by water. Only limited number of craft will have the opportunity to tie up, due to potential for conflict with non-motorized boat traffic along this section of the waterfront."

The plan's intent is clear. The Park would permit limited transient docking in order to maximize the access to the park by the general boating public. The plan does not state the Park will provide overnight or long term docking and camping facilities. The Georgetown Waterfront Park was never intended nor was it ever designated as a marina, to be used for overnight accommodations. No services such as water, power and sewage hook ups were planned or installed for this activity. Public restrooms and trash receptacles were not provided for overnight camping. In addition fees for use of the public dock were not established.

Since there are no public facilities available and the Georgetown Waterfront Plan is specific about transient docking only, the Superintendent is allowed under Title 36

Code of Federal Regulations Section 1.5 (a) to set public use limits consistent with applicable legislation and Federal administrive [sic] policies and based upon a determination that such action is necessary for the maintenance of public health and safety, protection of environmental or scenic values, protection of natural or cultural resources, aid scientific research, implementation of management responsibilities, equitable allocation and use of facilities, or the avoidance of conflict among visitor use activities. The Superintendent is meeting his mandate to properly manage and safeguard the park and it's [sic] visitors by imposing a two hour docking limit from 12 Midnight to 6 AM.

Appendix L- Letter from William D. Shaddox, Chief, Land Resources Division, National Park Service to David Charles Masselli dated August 30, 1995

United States Department of the Interior

NATIONAL PARK SERVICE
P.O. Box 37127
Washington, D.C. 20013-7127

IN REPLY REFER TO L1425 (660

AUG 30 1995

Mr. David C. Masselli
Masselli & Lane, P.C.
Suite 260
8260 Greensboro Drive
McLean, Virginia 22102

Dear Mr. Masselli:

This is in response to your request of August 11, under the Freedom of Information Act, for copies of deeds and related documents pertaining to the Federal acquisition of less-than-fee interests in privately owned lands within the National Park System.

Pursuant to a telephone conversation on August 24 between you and Mike Walsh of this Office, we are enclosing copies of six easement deeds and a listing of easement acreage acquired

by the Service in each State. We believe that the enclosed easement deeds are representative of the deeds with which the Service has acquired easement interests in approximately 3,200 tracts of land.

We trust this satisfies your request. There will be no charge for the information enclosed.

Sincerely,

/s
William D. Shaddox
Chief, Land Resources Division

Enclosures

Appendix M - Master Deed Listing: Listing of Acreage By State As of 12/31/94

State	Fee	(Easement) Federal Less-Than-F	Federal Sub-Total	Non-Federal Other Public	Non-Federal Private	Non-Federal Sub-Total	Gross Area
Alabama	6,331.52	202.42	6,533.94	5,169.00	9,324.30	14,493.30	21,027.24
Alaska	51,223,739.22	12,438.53	51,236,177.75	354,144.29	3,154,941.58	3,509,085.87	54,745,263.62
Arizona	2,672,396.48	162.08	2,672,558.56	19,871.19	140,575.49	160,446.68	2,833,005.24
Arkansas	98,197.56	3,200.67	101,398.23	2,729.05	469.30	3,198.35	104,596.58
California	4,574,836.73	162.04	4,574,998.77	3,248,907.55	169,083.10	3,417,990.65	7,992,989.42
Colorado	591,242.12	5,510.52	596,752.64	226.11	6,417.43	6,643.54	603,396.18
Connecticut	5,350.58	710.96	6,061.54	940.47	741.46	1,681.93	7,743.47
Dist. Of Col.	6,925.63	0.00	6,925.63	0.00	25.71	25.71	6,951.34
Florida	2,319,677.51	1,330.00	2,321,007.51	118,621.08	190,606.17	309,227.25	2,630,234.76
Georgia	40,762.19	23.74	40,785.93	16,814.51	6,320.39	23,134.90	63,920.83
Hawaii	235,408.43	1.02	235,409.45	11,392.44	3,194.55	14,586.99	249,996.44
Idaho	98,782.26	445.02	99,227.28	1,394.07	5,209.09	6,603.16	105,830.44
Illinois	12.03	0.00	12.03	0.00	0.21	0.21	12.24
Indiana	9,932.79	488.06	10,420.85	3,315.32	1,547.51	4,862.83	15,283.68
Iowa	1,662.50	0.00	1,662.50	4.59	1.10	5.69	1,668.19
Kansas	429.00	269.20	698.20	38.73	0.00	38.73	736.93
Kentucky	93,282.05	136.87	93,418.92	814.75	12.83	827.58	94,246.50

Appendix M - Master Deed Listing: Listing of Acreage By State As of 12/31/94

Louisiana	10,135.69	0.40	10,136.09	2,348.22	8,640.77	10,988.99	21,125.08
Maine	63,336.91	5,989.85	69,326.76	12,150.07	3,923.04	16,073.11	85,399.87
Maryland	35,946.92	5,731.40	41,678.32	22,895.90	5,293.30	28,189.20	69,867.52
Massachusetts	32,609.76	698.61	33,308.37	20,574.09	1,951.60	22,525.69	55,834.06
Michigan	631,051.90	1,025.93	632,077.83	58,514.84	27,485.21	86,000.05	718,077.88
Minnesota	138,591.69	3,072.86	141,664.55	98,877.10	60,626.10	159,503.20	301,167.75
Mississippi	102,633.49	5,262.16	107,895.65	21.21	8,575.08	8,596.29	116,491.94
Missouri	54,156.37	9,279.19	63,435.56	14,062.59	5,359.03	19,421.62	82,857.18
Montana	1,220,234.07	1,114.08	1,221,348.15	1,468.27	50,153.95	51,622.22	1,272,970.37
Nebraska	5,371.41	491.26	5,862.67	36.29	354.40	390.69	6,253.36
Nevada	777,016.64	0.00	777,016.64	80.88	1,434.67	1,515.55	778,532.19
New Hampshire	9,448.71	755.61	10,204.32	161.78	95.26	257.04	10,461.36
New Jersey	35,336.79	34.60	35,371.39	15,746.46	2,056.15	17,802.61	53,174.00
New Mexico	373,050.80	5.26	373,056.06	5,770.53	11,288.66	17,059.19	390,115.25
New York	32,653.65	3,802.13	36,455.78	19,725.05	39,350.54	59,075.59	95,531.37
North Carolina	368,262.97	12,218.25	380,481.22	3,072.88	3,340.93	6,413.81	386,895.03
North Dakota	71,382.76	257.60	71,640.36	55.84	886.97	942.81	72,583.17
Ohio	17,614.85	1,311.98	18,926.83	8,418.01	6,432.21	14,850.22	33,777.05
Oklahoma	9,875.13	9.20	9,884.33	4.50	26.90	31.40	9,915.73
Oregon	194,475.75	379.44	194,855.19	174.68	2,821.46	2,996.14	197,851.33
Pennsylvania	46,571.33	1,885.98	48,457.31	18,784.18	41,955.44	60,739.62	109,196.93

Appendix M - Master Deed Listing: Listing of Acreage By State As of 12/31/94

Rhode Island	4.56	0.00	4.56	0.00	0.00	0.00	4.56
South Carolina	26,239.58	31.25	26,270.83	48.82	1,879.39	1,928.21	28,199.04
South Dakota	141,302.28	122,326.95	263,629.23	79.24	9,894.46	9,973.70	273,602.93
Tennessee	342,577.62	1,520.79	344,098.41	3,634.52	21,959.93	25,594.45	369,692.86
Texas	1,172,911.06	75.62	1,172,986.68	5,156.47	57,258.30	62,414.77	1,235,401.45
Utah	2,021,357.67	1,278.70	2,022,636.37	68,612.64	5,194.81	73,807.45	2,096,443.82
Vermont	7,333.75	1,080.02	8,413.77	2,248.83	4,216.24	6,465.07	14,878.84
Virginia	314,794.09	4,492.09	319,286.18	7,584.11	10,457.76	18,041.87	337,328.05
Washington	1,930,987.17	1,419.97	1,932,407.14	12,621.38	18,926.84	31,548.22	1,963,955.36
West Virginia	46,809.77	389.62	47,199.39	7,723.94	25,918.01	33,641.95	80,841.34
Wisconsin	62,432.03	10,286.58	72,718.61	47,705.72	13,317.09	61,022.81	133,741.42
Wyoming	2,392,077.43	1,126.06	2,393,203.49	1,380.07	1,749.67	3,129.74	2,396,333.23
American Samo	0.00	0.00	0.00	4,500.00	4,500.00	9,000.00	9,000.00
Guam	915.69	0.00	915.69	873.47	170.91	1,044.38	1,960.07
Puerto Rico	53.20	0.00	53.20	21.93	0.00	21.93	75.13
Virgin Islands	13,812.81	3.00	13,815.81	793.01	1,932.20	2,725.21	16,541.02
Grand Total	74,682,334.90	222,437.57	74,904,772.47	4,250,310.67	4,147,897.50	8,398,208.17	83,302,980.64